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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

CLIFFORD F. GURNEY, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

STEPHEN M. TRUITT
Counsel of Record
CHARLES H. CARPENTER
PEPPER HAMILTON LLP
1300 Nineteenth Street, NW
Washington, DC 20036-1685
(202) 828-1200

JOHN A. WESTBERG
LEWIS M. JOHNSON
WESTBERG & JOHNSON
1300 Nineteenth Street, NW
Washington, DC 20036-1685
(202) 835-9810

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QUESTIONS PRESENTED

I.

Whether, when the consideration exchanged for real and personal property taken *per se* is less than just compensation, the United States is liable to pay the property owners the constitutional shortfall in a Tucker Act proceeding?

II.

Whether the executive branch may finally fix the amount to be paid for property it takes without impermissibly encroaching on the power of the judicial branch to determine just compensation?

III.

Whether the receipt of a substantial benefit less than just compensation for the appropriation of a citizen's property makes that appropriation non-compensable?

IV.

Whether the President's power to espouse and settle claims against a foreign government is an appurtenance of all property acquired in international commerce or located abroad so that an exercise of this power is not a compensable taking?

LIST OF PARTIES

The following persons and entities participated in the case below and are petitioners here:

Walter Abrahim-Youri
Emanuel Aryeh
Nouriel Aryeh
Ouriel Aryeh
Samuel Aryeh
Mehrdad Azarmi
Jalil Fardanesh
Delta Geotechnical Consultants, Inc.
Clifford F. Gurney
David Laylin
Lockwood Green International, Inc.
Bahman Maalizadeh
Odsiran Data Systems, Inc.
Odsiran Meteorological Systems, Inc.
Robert L. Rutz
Jean Bijan Samimy, M.D.
Lina Z. Samimy, M.D.
Carolyn D. Spatta
University of Northern Colorado
University of Pittsburgh
Richard C. Willson, Jr.
Dara Zargar

Respondent the United States was the only other party in the Court below.

LIST OF PARENT COMPANIES AND NON-WHOLLY OWNED SUBSIDIARIES

Philipp Holtzmann USA Inc., a wholly owned subsidiary of Philipp Holtzmann, is the parent corporation of petitioner Lockwood Green International, Inc. Lockwood Green does not have any non-wholly owned subsidiaries. Odsiran Meteorological Systems, Inc. and Odsiran Data Systems, Inc. are both wholly owned subsidiaries of Ocean Data Systems, Inc. Neither has non-wholly owned subsidiaries. Delta Geotechnical Consultants, Inc. has no parent, and no non-wholly owned subsidiaries.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Federal Circuit (App. 1a) is not yet reported. The opinion of the Court of Federal Claims (App. 18a) is reported at 38 Fed. Cl. 482 (1996).

JURISDICTION

The judgment of the Court of Appeals was entered December 4, 1997. (App. 1a.) This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES AND STATUTES INVOLVED

Amendment V of the United States Constitution provides "nor shall private property be taken for public use, without just compensation." The Tucker Act, 28 U.S.C. 1491(a)(1) provides "[t]he United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded . . . upon the Constitution . . ." The Settlement Agreement for Claims of Less Than $250,000, Case No. 86 and Case No. B38, made between the United States and the Islamic Republic of Iran on May 13, 1990, is reproduced in the Appendix at 30a-40a.

STATEMENT OF THE CASE

Petitioners[1] are United States nationals who owned real and personal property and related claims against the

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[1] Petitioners are individuals, companies, and educational institutions. Their complaint was filed on their own behalf and as representative of all claimants receiving awards from the Foreign Claims Settlement Commission. Their motion for class certification was denied as moot by the Court of Federal Claims.

Government of Iran ("Iran") arising out of the Iranian Revolution. The real and personal property was situated in Iran. The claims against Iran were pending at the Iran-United States Claims Tribunal in the Hague, The Netherlands. In 1990 the President, acting alone, condemned the petitioners' property and conveyed it to Iran "as is and where is." The President also fixed compensation for the property at $50,000,000. The Foreign Claims Settlement Commission determined the value of the property taken to be far in excess of this amount. Petitioners filed suit in the Court of Federal Claims under 28 U.S.C. 1491(a)(1) to secure just compensation under the Fifth Amendment: a "cash award" for the "constitutional shortfall."[2]

* * * * *

The Algiers Declarations ("Declarations"), upheld by this Court in *Dames & Moore v. Regan*, 453 U.S. 654 (1981), resolved the "Iranian Hostage Crisis." The Declarations moved adjudication of the claims of U.S. nationals against Iran arising out of the Iranian Revolution from U.S. courts to a new arbitral forum (the Iran-United States Claims Tribunal or "Tribunal") and provided funding for awards in favor of United States claimants. The Declarations also divided claims in two categories, large and small. Large Claims ($250,000 or more) were presented at the Tribunal by each Large Claimant itself. Small Claims, although also referred to the Tribunal, were presented by the United States as "trustee, guardian and representative," on behalf of the Small Claimants.[3]

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[2] *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 148 (1974).

[3] *Lord Corporation, a claim of less than $250,000 presented by the United States of America v. Iran Helicopter Support and Renewal Company*, 18 Iran-U.S. Cl. Trib. Rep. 377, 384 n.3 (1988). The United

(continued...)

The Small Claims at the Tribunal

The Tribunal commenced proceedings in 1983 on some 2,800 Small Claims filed with it. At the Tribunal, prevailing Small Claimants[4] collected payment in full including interest on awards to the date of payment. Iran has replenished the security account for the payment of Tribunal awards several times so that every Tribunal award against Iran has been paid in full including interest to the time of payment.

The Settlement Agreement

In May 1990, without specific notice to or consent of the Small Claimants, the United States entered into the Settlement Agreement (App. 30a) expressly appropriating all Small Claims by means of espousal.[5] It then conveyed the claims to Iran. In addition, the United States conveyed to Iran all property, real or intangible, that was the subject matter of a

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[3](...continued)
States considered the relationship between the Small Claimants and the government to be, "if anything, one of greater trust than that of private clients to their attorney." *Dames & Moore v. Department of Treasury*, 544 F. Supp. 94, 99 (C.D. Cal. 1982) (quoting declaration of James H. Michel, Deputy Legal Advisor of the Department of State).

[4] Of the 32 reported small claims decisions, 19 (59% of those decided) were adjudicated in favor of U.S. claimants. Seventy-one Small Claimants received awards on agreed terms. Thus, of the Small Claims resolved at the Tribunal by decision or Tribunal approved settlement, 87% received an award. The comparable statistic for Large Claimants is 74%. (App. 46a, 47a. Johnson Aff.).

[5] "Espousal" is the formal taking up of a citizen's claim against a foreign sovereign, *see* Restatement (Second) of Foreign Relations Law § 211 comment (a) (1965), and vests title to the claim in the United States. *See La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 459 (1899); 8 M. Whiteman, Digest of International Law 1216-33 (1967).

Small Claim or related to it even if the Claim had been withdrawn, dismissed on jurisdictional grounds, was never filed, or even if the claimant still owned the property in question.[6] The Settlement Agreement also resolved two outstanding claims of the United States arising from defaulted loans to Iran. In exchange for claims' dismissals and termination and related property transfers Iran agreed to pay the United States the sum of $105,000,000.

Under the terms of the Settlement Agreement, the allocation of the $105,000,000 between the three categories of claims (Small Claims, No. 86, and B38) was "within the sole competence and responsibility of the Government of the United States." (App. 34a (Settlement Agreement § III (iii)).) The government allocated $50 million for payment of the Small Claims and the remaining $55 million for payment of two other claims, which were claims of the United States itself arising from loans it had made to Iran. The United States thus satisfied its own claims to the detriment of the Small Claimants.

The Commission's Computation of Awards

The Small Claims were referred to the Foreign Claims Settlement Commission ("Commission") for valuation. The Commission was directed to decide each claim applying Tribunal precedent, taking into account defenses available to Iran. (App. 34a (Settlement Agreement § III (v)).) It made awards on only about one third of the Small Claims,

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[6] This happened in cases where the claimant alleged an expropriation by Iran but failed to show it and thus remained the owner of the property in question up to the date of the Settlement Agreement. *See, e.g.*, App. 90a (*Matter of Fardanesh*); App. 60a (*Matter of Zargar*); App. 76a (*Matter of Azarmi*).

considerably less than the two-thirds or better success rate of claimants at the Tribunal.

Where the property taken was a claim against Iran, the Commission included in its award interest accruing from the time the claim arose to June 22, 1990, the date the claim was taken by the Agreement. In cases where the United States took property *related* to a claim (real or personal property still owned by a Small Claimant because the expropriation by Iran was not established as alleged), the Commission awarded no interest because no interest had accrued before June 22, 1990.[7]

Small Claimants whose choses in action were taken did not receive what the Commission found due, however. The United States paid these petitioners less than the Commission awarded because the $50,000,000 set by the President to pay the claims was insufficient.[8] Secondly, the United States neither computed nor paid *any* interest for the period after the

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[7] The reasoning was that the claimant continued to own the property up to the date of the Settlement Agreement, when it was taken, and interest was not due, therefore, for this period. *See* App. 91a (*Matter of Fardanesh*). Such prevailing Small Claimants received the full amount of what the Commission awarded but no interest for the period from the Settlement Agreement to the payment, almost five years.

[8] Petitioners here were awarded *in toto* principal of $3,335.945.41 and interest up to June 22, 1990 of $2,801,408.28. Only $1,046,971.12 of this interest found due was paid, leaving a shortfall of $1,754,437.16. or approximately 29% of the total awarded by the Commission. The comparable statistics for the claimants as a whole are principal of $41,570,936.31, interest through June 22, 1990 of $44,984,859.31, with a shortfall of $29,457,290.66.

No Petitioner received interest for any period *after* June 22, 1990. To the initial underpayment, then, must be added (a) approximately four years of interest on the entire award, as it came after the taking and (b) an additional three years of interest on the underpayment.

Settlement Agreement to the date of payment, which was almost five years. This cash shortfall affected all successful claimants.

Petitioners then sued in the Court of Federal Claims asserting their real and personal property had been taken *per se* and that the payment received was less than just compensation as defined by this Court. Petitioners sought a partial summary judgment of the United States' liability for the constitutional shortfall between what petitioners received and fair market value of their houses, orchards, claims, bank accounts, and businesses at the time of their appropriation and conveyance by the United States to Iran and interest to the date of payment.

The Decisions Below

The Court of Federal Claims denied petitioners' motion and granted the United States' cross-motion for summary judgment. The court rejected petitioners' contention that their property had been taken *per se*. Applying its interpretation of the analysis announced by this Court in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), the court determined that the espousal and settlement did not amount to a compensable taking because, primarily, some compensation had been made available.

The Court of Appeals for the Federal Circuit recognized that petitioners' property had been taken *per se*, not merely regulated.[9] (App. 8a.) In the court's view, however, this was

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[9] The court refers to the property affected as "claims" against Iran without acknowledging that real property, tangible property, as well as intangibles other than claims, were also taken and conveyed to Iran. *See e.g.*, App. 84a, 90a (*Matter of Fardanesh*: taking of two pieces of real property); App. 63a (*Matter of Zargar*: taking of apartment building and

(continued...)

not enough to find governmental liability. The court concluded that the factors identified by the Court of Federal Claims in its regulatory takings analysis under *Penn Central* were "relevant" in determining if there had been a "compensable taking."[10] (App. 8a.) The court then denied liability finding that because the President has the power to settle claims against a foreign sovereign, "it does not strain *Lucas* [*v. South Carolina Coastal Council*, 505 U.S. 1003 (1992)] beyond its intended purpose" to hold the exercise of that power is not compensable. (App. 13a.)

Secondly, the court denied liability because it found, without any basis in the record, that petitioners were the "particular intended beneficiaries" of the Settlement Agreement within the purview of *National Board of Young Mens Christian Ass'ns v. United States*, 395 U.S. 85, 92 (1969), and that they had "substantially benefitted" from the settlement. (App. 11a.) The court ignored that the benefit received was "demonstrably and measurably inferior"[11] to what they would have received had they been allowed to proceed at the Tribunal where their claims would have been paid in full including interest to the date of payment. *See Exxon Corp. v. Iran*, 17 Iran-U.S. Cl. Trib. Rep. 3, 21-22 (1987) (Brower, J., concurring).

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[9](...continued)
surrounding land); App. 76a (*Matter of Azarmi*: taking of right to refund of down payment and right to delay damages from builder).

[10] Ordinarily courts reach "dramatically different results" depending on whether the taking is viewed as "regulatory" or *per se*. *See Hall v. City of Santa Barbara*, 833 F.2d 1270, 1275 (9th Cir. 1986), *cert denied*, 485 U.S. 940 (1988).

[11] *Chas. T. Main Int'l, Inc. v. Khuzestan Water & Power Auth.*, 651 F.2d 800, 815 (1st Cir. 1981).

The concurrence, agreeing with the "analysis and result" of the majority opinion, found the case to be "significant." In particular, the case provided an opportunity to recognize that "certain '*per se*' takings . . . which involve a property owner being ousted from his property by government action . . . do not automatically result under the fifth amendment in compensation to the ousted property owner." (App. 14a.) The concurrence suggested a "rule of reason analysis" be applied *ad hoc* to determine if "governmental interests in espousal are so weak" as to warrant compensation. Petitioners having made no such showing, the taking was therefore "non-compensable."

The court did not discuss this Court's decisions in *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974), and *Dames & Moore v. Regan*, relied on by petitioners below.

REASONS FOR GRANTING THE WRIT

When the President, acting alone, appropriates a citizen's property and conveys it to another, may he also finally fix the compensation to be paid for that property thereby foreclosing judicial inquiry as to its actual value? Or must there be a judicial inquiry and hearing allowing the injured citizen to prove the "constitutional shortfall" between the compensation set by the President and the property's actual fair market value at the time of transfer plus interest to the date of payment, *i.e.*, the just compensation this Court has required?[12]

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[12] Interest from the taking date to the time of payment is a part of just compensation. *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 149 (1974), *Kirby Forest Indus. Inc., v. United States*, 467 U.S. 1, 10 (1984); *E-Systems, Inc. v. United States*, 2 Cl. Ct. 271, 278 (1988).

These questions "touch fundamentally upon the manner in which our republic is to be governed."[13]

The President may spend the "bargaining chips" of a citizen's property to achieve an international agreement, but the issue of who ultimately pays -- the national or the nation -- presents an intrinsically important question.[14] The decision below is disruptive: if there is no effective damage remedy at law under the Tucker Act, future claimants of necessity will seek district court injunctions on due process grounds directly restraining implementation of agreements by the executive *before* they take effect.[15] Forcing that option upon claimants would have two undesirable effects. First, it would undermine the President's power to negotiate such resolutions as the Agreement's effectiveness would turn on the outcome of such a challenge. Secondly, the reviewing court, if not the Court of

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[13] *Dames & Moore v. Regan*, 453 U.S. 654, 659 (1981).

[14] See Cohen & Ravitch, Economic Sanctions, Domestic Deprivations, and the Just Compensation Clause: Enforcing the Fifth Amendment in the Foreign Affairs Context, 13 Yale J. Int'l L. 146, 162 (1988), urging that the "principle of just compensation for takings abroad" be adopted. ". . . [W]here the United States has either signed a treaty that 'takes' title or allows a foreign state to assume title as a part of the agreement, or has itself acquired use of the contested property, it should be held liable in the Claims Court for its actions."

[15] Compare *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), granting injunctive relief against a governmental seizure in the absence of a Tucker Act remedy with *Dames & Moore v. Regan*, 453 U.S. 654 (1981), denying injunctive relief on grounds the Tucker Act damage remedy was an adequate remedy at law thereby precluding equitable relief. To the same effect compare the district court decision enjoining the "conveyance taking" of rail properties because of the unavailability of a Tucker Act remedy with the Supreme Court's vacation of that injunction, having found the Tucker Act remedy available. *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 119-20 (1974).

Federal Claims in a Tucker Act suit, would have to examine the adequacy of compensation in a vacuum, in the rushed atmosphere of a preliminary injunction hearing, and without an appropriately "developed record."[16]

The rule announced below -- that there is no effective Tucker Act remedy for takings by Presidential espousals -- will govern all future executive agreements. And the "sheer magnitude"[17] of the Presidential power asserted makes this case worthy of consideration by this Court. Yet very likely the decision will never conflict with that of another circuit thereby invoking this Court's customary *certiorari* discretion. This is an artifact of the peculiar, exclusive appellate jurisdiction of the Federal Circuit over damage claims against the United States. 28 U.S.C. § 1295(a)(2) & (3). This exclusivity guarantees that all money claims for takings by espousal will come through the Court of Appeals for the Federal Circuit and nowhere else.[18]

Two portions of the opinion stand out for their dissonance with Fifth Amendment jurisprudence. First, the court below erroneously indicated that the appropriation of a citizen's property is not a compensable taking if the appropriation, although complete, nonetheless confers through a compensation mechanism a "substantial" benefit upon the citizen which is less than "just compensation." This view

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[16] *Regional Rail Reorganization Act Cases*, 419 U.S. at 146.

[17] *Dames & Moore*, 453 U.S. at 688 (quoting with approval *Chas. T. Main Int'l, Inc. v. Khuzestan Water & Power Auth.*, 651 F. 2d 800, 814 (1st Cir. 1981)).

[18] This is not true of most taking claims against the United States which almost invariably involve real property interests located within the United States. District courts have jurisdiction over such proceedings under 28 U.S.C. 1358 with concomitant review in all circuit courts.

misconstrues this Court's decision in *National Board of Young Mens Christian Ass'ns v. United States*, 395 U.S. 85 (1969) (*"YMCA"*), and would convert the Fifth Amendment to read "nor shall private property be taken for public use without *substantial* compensation."

Second, the court erroneously found that the President's right to espouse is an attribute of all property acquired through international commerce or located abroad. The court thus misconstrued *Lucas* by including in the "logically antecedent" analysis of the common law attributes of the property in question *the power of eminent domain itself.*[19] While some "circularity must be tolerated . . ." in takings analysis,[20] the court below surely goes too far, as it would eliminate just compensation for takings altogether.

The holding is also wrong on the merits -- the President is bound by the Bill of Rights "even when acting in the sphere of international relations,"[21] and does not have a right to appropriate private property for public use without just compensation. These issues -- whether if the citizen has realized some benefit the appropriation of his property is not compensable, whether the power of eminent domain itself is a part of background law to be examined when making a *Lucas* determination, and whether the unexercised power of condemnation is an attribute of all property such that its exercise is not compensable -- arise in any number of contexts in the several circuits and in each of the states.

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[19] The power of espousal is a species of the eminent domain power. See pp. 26-27, *infra*.

[20] *Lucas*, 505 U.S. at 1034 (Kennedy, J., concurring).

[21] *Main*, 651 F.2d at 813, n. 20.

The decisions of this Court hold that conveyance takings of property are compensable and that victims of such expropriation must be able to obtain a "cash award" for the "constitutional shortfall" for their injury in a suit under the Tucker Act, precisely the remedy the decisions below made unavailable. Accordingly, the case merits review.

1. The Decision Below is Inconsistent with this Court's Decisions in the *Rail Reorganization Cases* and *Dames & Moore v. Regan*

The taking and conveyance to Iran of petitioners' property here are indistinguishable from the "conveyance taking" in *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974).[22] There the Rail Act directed the transfer by the Penn Central (the "debtor") of its railroad property (real and personal) to a government corporation as part of the reorganization of the bankrupt northeast rail operations. The Act also provided compensation consisting of money and securities in new reorganized entities. The debtor objected on grounds that the consideration which Congress provided in exchange for the conveyance of its railroad properties was inadequate. It was clear, however, that Congress in enacting the Rail Act intended that no further compensation be provided to the debtor above what the Act provided. The debtor then sought to enjoin the transfer on grounds that the Rail Act deprived it of its property without due process of law.

When this Court was considering the challenge to the Rail Act, no court had yet passed on the constitutional adequacy of the congressionally fixed compensation. The availability of review under the Tucker Act, where that issue

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[22] The court below did not discuss or refer to this case although it was relied on by petitioners.

could be resolved, saved the scheme from immediate constitutional scrutiny:

> Congress fully expected that this consideration would provide the minimum compensation required by the Constitution; it wished to provide no more. If, however, that hopeful expectation should not be fulfilled, and the consideration exchanged for the rail property should prove to be less than the constitutional minimum, the Tucker Act will be available as the jurisdictional basis for a suit in the Court of Claims for *a cash award to cover any constitutional shortfall. Id.* at 148 (emphasis added).

This Court applied these principles in *Dames & Moore v. Regan* to the President's power to settle claims against foreign nations. In deciding that the Tucker Act was available as a remedy for any unconstitutional taking, this Court necessarily found that the interests there at issue -- claims against Iran -- were property capable of being taken in violation of the Fifth Amendment. Otherwise, this Court would not have been required to decide the availability of the Tucker Act remedy: it could simply have stated no such remedy need be available because claims against a foreign government and tangible property abroad, are not property, or that the United States has an inherent right to appropriate these claims without compensation.

Dames & Moore is this Court's most recent discussion of the relation of the takings clause and the foreign relations power. But the Presidential action considered there was fundamentally different from the action taken here. In *Dames & Moore*, the President had shifted the venue of claims'

adjudication to the Tribunal; there was no appropriation and transfer of claims or real property of U.S. citizens as here. Nevertheless, a taking of property without just compensation was threatened by the operation of the Algiers Declarations and this made "ripe for adjudication the question whether petitioner will have a remedy at law under the Tucker Act..." 453 U.S. at 689.

There were several bases argued for contending that claims might be "taken" by the Declarations without provision for just compensation. First, there was no assurance that Iran would replenish the escrow account once it was depleted by awards. Thus, there was a distinct possibility that claimants would go to the Tribunal but return with less than just compensation or no compensation at all. Second, not all claimants referred to the Tribunal were eligible to have their claims heard there. Certain contract claims were excluded from the jurisdiction of the Tribunal by Article II, Section 1 of the Claims Settlement Declaration. Nevertheless, the Declarations "terminated" these claims and excluded them from the jurisdiction of the courts of any nation.[23] Such claimants would have had their claims terminated, yet not be within the Tribunal's jurisdiction -- a "Catch-22" leaving them with no remedy.

Dames & Moore was in this situation. (Transcript of Oral Argument, Petitioner's counsel at 6.) Accordingly, it urged that the Tucker Act damage remedy must be available to it under *Regional Rail Reorganization Act Cases* should their

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[23] Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, January 19, 1981, art. VII(2), 20 I.L.M. 223 (1981).

claim go to the Tribunal only to be dismissed on jurisdictional grounds. As Mr. Justice Rehnquist inquired of the Solicitor General, ". . . what if they go through all these steps and come back and can show a loss, then do they have a takings claim?" (Tr. Oral argument, 41). As the provisions of 28 U.S.C. § 1502 exclude claims "arising under or dependent on a treaty" from the jurisdiction of the Court of Federal Claims that forum seemed *un*available for a Tucker Act claim. This dilemma was eased by the Solicitor General's concession at oral argument that §1502 did *not* bar the Tucker Act remedy. This Court added "We agree." *Id.* at 689.

At no point did this Court suggest that Dames & Moore's claim was anything but property subject to the protection of the Fifth Amendment and capable of being taken by the United States.[24] Nor was it suggested that the President had an "easement" of some kind allowing him to take complete possession of its claim without compensation. Had such been the case, much of this Court's opinion would have been unnecessary.

The impact of the Settlement Agreement is far more direct than the potential effect of the Declarations on Dames & Moore's claims. Here petitioners' property was *appropriated* and *conveyed* to Iran.

2. The President's Determination of "Just Compensation" Usurps a Purely Judicial Function

This Court considered in *Monangahela Nav. Co. v. United States*, 148 U.S. 312 (1893), legislation fixing the

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[24] This seems to be the thrust of the opinion below when it suggests that the right to compensation is not in petitioners' "bundle of sticks" because the property involved is not located in the United States.

compensation to be paid for property condemned, locks and a dam on the Monangahela River, at a sum not to exceed $161,733.13. The law also stated that in proceedings to value the property, "the franchise of said corporation to collect tolls shall not be considered." In holding that the Congressionally imposed dollar limit could not be given effect, this Court stated

> By this legislation Congress seems to have assumed the right to determine what shall be the measure of compensation . . . *But when the taking has been ordered, then the question of compensation is judicial.* It does not rest with . . . the legislature . . . to say what compensation shall be paid, or even what shall be the rule of compensation." 148 U.S. at 327 (emphasis added).

An unbroken line of this Court's decisions has maintained the vitality of this proscription. *United States v. New River Collieries, Co.*, 262 U.S. 341 (1923), reiterated ". . . ascertainment of compensation is a judicial function, and no power exists in any department of the government to declare what compensation shall be or to prescribe any binding rule in that regard." *Id.* at 343-44. More recently, in 1980, this Court reaffirmed ". . . the ancient principle that the determination of the measure of just compensation for a taking of private property 'is a judicial and not a legislative question.'" *United States v. Sioux Nation of Indians*, 448 U.S. 371, 417 n. 30 (1980).

What the Congress acting together with the President is forbidden to do cannot be accomplished by the President acting on his own authority. Yet that is the result of the decision below. The President has taken property and assumed to himself the wholly "judicial function" of determining the

amount of "just compensation." In finding that the President had provided an adequate alternative to either continued enjoyment of the property or just compensation, the Federal Circuit endorsed this procedure. This stands in contradiction to *Monangahela* and its progeny.

The encroachment by the President on the function of another coequal department, the judicial branch, is neither minor nor inconsequential. It is thorough and complete: there is essentially no role for the judiciary under the decision below, no matter what compensation is set. Under the analysis of *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 850 (1986) this is an "aggrandizement" of Presidential power "at the expense of a coordinate branch."

Permitting the judiciary to exercise its exclusive power to determine just compensation will not inhibit the President's exercise of his foreign affairs power. Judicial review will only mean that the public, not individuals, bear the costs of our foreign policy goals. In fact President Carter was specifically advised by his counsel *before* entering the Algiers Declarations that *Rail Reorganization Act Cases* required a constitutionally adequate compensation for the claimants who were diverted from U.S. district courts to the Tribunal. *See* App. 41a-45a (Testimony of Lloyd Cutler, Esq. in *Halliburton Corp. v. Commissioner*, No. 9797-86 (U.S. Tax Ct.)).

This Court should grant *certiorari* and clarify, for benefit of the court below and the President, that determinations of just compensation for a taking by the United

States are judicial functions, notwithstanding the fact that the appropriation is undertaken to advance foreign policy goals.[25]

3. The Decision Below Impermissibly Broadens this Court's Decision in *YMCA*

This Court should grant *certiorari* in order to clarify that the decision in *YMCA* was limited to emergencies where immediate government action was necessary to protect substantial private interests, and to clarify to the Federal Circuit and all other courts that receipt of some benefit less than just compensation does not, of itself, convert an otherwise compensable taking into a permitted encroachment.

The court below reasoned that because petitioners received a "substantial" benefit from the espousal and settlement, there had been no compensable taking. Not only does this confuse the distinct taking and compensation analyses, it is a serious misapplication of the authority relied upon below -- this Court's holding in *YMCA*.

YMCA arose from a civil disturbance in the Panama Canal Zone. *YMCA*, 395 U.S. at 86. In the course of the disturbance, a building owned by the YMCA was damaged. The YMCA sued, claiming that its building was damaged as the direct result of the U.S. Army's having taken up positions first in front of the building, and later inside the building. The Court rejected this claim, finding that the damage to the building was caused by the rioters, and not by the United States. *Id.* at 89. In addition, however, the Court considered whether the United States was liable under the Fifth

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[25] The exercise of this judicial function is all the more important where, as here, the taking occurs in peacetime and in the absence of an international emergency or other overarching foreign policy concern.

Amendment for the Army's temporary occupation of the building. The Court found that it was not, for two reasons: first, the YMCA had abandoned the building during the disturbance, and therefore was not deprived of its use by the Army's occupation. *Id.* at 89-90. Second, the Court found that the YMCA had stipulated that the Army had occupied the building for the primary purpose of protecting the building. The Court indicated that

> where, as here, the private party is the particular intended beneficiary of the governmental activity, 'fairness and justice' do not require that losses which may result from that activity may also "be borne by the public as a whole," even though the activity may also be intended incidentally to benefit the public. Were it otherwise, governmental bodies would be liable under the Just Compensation Clause to property owners every time policemen break down the doors of buildings to foil burglars thought to be inside. *Id.* at 92 (citations omitted).

This rule has been applied sparingly in the ensuing 30 years, perhaps because it has been consistently understood to stand for a proposition that does not often arise: that when the government occupies property to protect it, no compensable taking has occurred. *See Penn Central*, 438 U.S. at 128 (1978); *Hohri v. United States*, 782 F.2d 227, 243 n.36 (D.C. Cir. 1986), *vacated on other grounds*, 482 U.S. 64 (1987). Indeed, reported applications of the *YMCA* rule have involved the situation hypothesized in *YMCA*: damage to private property due to law enforcement activity. *See, e.g., Brannan v. City of Tulsa*, 932 P.2d 44 (Okla. Ct. App. 1996); *Wallace v. City of Atlantic City*, 608 A.2d 480, 482-83 (N.J. Super. Law 1992).

The Federal Circuit cited *YMCA* but did not apply its holding.[26] The court did not base its decision on the motives of the United States. Nor was there any indication that the court considered that the President acted from necessity. Indeed, there was no record evidence as to what moved the President to espouse and settle the small claims: the United States did not present any factual basis whatever for a conclusion that the espousal and settlement was motivated to benefit the petitioners in particular.[27]

By changing the inquiry from the government's need to act in an emergency to the hypothesized beneficial effects of the government's actions, the Federal Circuit's decision in this case stretches *YMCA* beyond recognition -- and, if the new interpretation is followed in other courts, will have a profound impact on takings jurisprudence. The *YMCA* rule, unambiguously based on the government's duty to act in an emergency for the benefit of particular citizens, is replaced with a rule which amounts to a complete fusion of the "taking" and "compensation" parts of the inquiry. Under the Federal Circuit's holding, a state would be free, for example, to

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[26] The court below also ignored this Court's discussion of *YMCA* in *Loretto v. Teleprompter Manhattan Teleprompter CATV Corp.*: where this Court distinguished physical invasion cases, such as *YMCA*, from permanent occupation cases, such as *Loretto*: 458 U.S. 419, 432 (1982). Here it is beyond dispute that petitioners property was permanently espoused -- that the government's action cannot be considered a "physical invasion short of permanent appropriation."

[27] The undisputed facts showed that before espousal, petitioners had the right, under Tribunal precedent, to be paid interest on their claims from the date of the taking by Iran through the date of payment. It is also undisputed that after the espousal and settlement, petitioners received substantially less interest than they would have if their claims had been decided at the Tribunal. Thus whatever "benefit" petitioners received was less than what was taken from them.

appropriate farmland to build a highway without compensation, provided it could show that the highway would allow the farmer better access to markets. A municipal body would be free to restrict all use of a landowner's real property and provide as compensation transferable development rights worth half the value lost to the real property. This interpretation "render[s] much of [the Court's] regulatory takings jurisprudence a nullity,", when applied to a *per se* taking. *Suitum v. Tahoe Regional Planning Agency*, 117 S. Ct. 1659, 1672 (1997) (Scalia, J. concurring) Taken to its logical conclusion -- in fact, as applied here -- the Federal Circuit's new rule is that the Constitution merely requires "substantial" compensation, not "just" compensation. Neither the language of the Fifth Amendment, nor any precedent of this Court, supports this interpretation.

4. The Court of Appeals' Inclusion of the Power of Eminent Domain in the "Logically Antecedent Analysis" Required by *Lucas*, Nullifies that Decision

In *Lucas*, this Court considered whether state restrictions on beachfront development constituted a taking under the Fifth and Fourteenth Amendments. The Court concluded that the property lost all economic value as a result of the restrictions, but could not determine whether a compensable taking had occurred. The Court held that a taking would not have occurred if the state had the power, under the common law, to impose the same restrictions without making just compensation:

> Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the prescribed use

> interests were not part of his title to begin with. *Lucas*, 505 U.S. at 1027.

The Federal Circuit has misapplied the Court's decision in *Lucas* to this case in two independent ways. First, the court below incorrectly conducted the "logically antecedent inquiry" by including the eminent domain power (espousal) as part of the "estate" that petitioners had in their overseas property. If this approach were correct there could *never* be a taking since all property (domestic and foreign) is subject to being condemned for the public good. Second, the court erroneously held that "the prescribed use interests" -- in this case continued possession of any interest in the seized property -- was not part of petitioners' "title to begin with." Taken together, these interpretations are remarkable distortions of *Lucas*, and, have obvious, far-reaching consequences. The court below would grant the President "plenary power to settle claims, even as against foreign governmental entities," the very power this Court refused to sanction in *Dames & Moore*. *Dames & Moore*, 453 U.S. at 688.

Since *Lucas*, courts have understood that the "logically antecedent inquiry" requires analysis of the property under the law that creates that property. *See, e.g., Corn v. City of Lauderdale Lakes*, 95 F.3d 1066, 1075 (11th Cir. 1996), *cert denied*, 118 S. Ct. 441 (1997); *Consarc Corp. v. Iraqi Ministry*, 27 F.3d 695, 701 & n.5 (D.C. Cir. 1994) (noting that while federal definition of property was applicable in determining propriety of administrative action, state definition would be applicable to takings claim); *Stevens v. City of Cannon Beach*, 854 P.2d 449, 453-57 (Or. 1993), *cert denied*, 510 U.S. 1207 (1994) (regulation preventing enclosure of beach property where Oregon law recognized public right of access). This is because, as the Court noted,

> [a]ny limitation so severe cannot be merely legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts . . . *Lucas*, 505 U.S. at 1029.

Neither the Federal Circuit nor the government has identified a court with the power to transfer complete ownership of petitioners' property without compensation. While there has been some confusion as to whether the "common law" to be applied in this inquiry includes statutes, *see, e.g., Kim v. City of New York*, 681 N.E.2d 312, 315 (N.Y.), *cert denied*, 118 S. Ct. 50 (1997) (analyzing divergent views), as well as whether this inquiry is truly "antecedent," or whether it folds into the "reasonable investment-backed expectations" prong of a *Penn Central* analysis, *see, e.g., Colorado Dept. of Health v. The Mill*, 887 P.2d 993, 1002-03 (Colo. 1994), *cert denied*, 515 U.S. 1159 (1995), there has never been a suggestion that a court should *not* look at the law of the state or nation where the property exists.

Here petitioners' rights derived from a variety of different laws.[28] Petitioner Gurney, for example, had a right

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[28] This case raises the subsidiary question whether the Just Compensation clause applies to property located abroad, an issue this Court has not finally resolved, although it has implied and the lower courts have found that the Fifth Amendment obligation of just compensation applies to the taking by the United States of property owned by a citizen but located outside the United States. *United States v. Belmont*, 301 U.S. 324, 332

(continued...)

under Iranian employment law to receive a termination payment after his twelve-year job at the Iranian embassy in Washington, D.C. ended. (App. 51a-52a.) Petitioner University of Northern Colorado had a contractual right to be paid tuition (App. 80a-82a), under Colorado law. Petitioners Zargar and Samimy owned real property in Iran. (App. 55a-56a.) Under the holding of *Lucas*, as it has been almost universally applied, the Federal Circuit was required to determine that the President's right to take their property without compensation was an attribute of Iranian contract law, Colorado contract law, and Iranian property law, respectively. The government did not assert, and the Federal Circuit did not determine, that the President's rights arise under the law underlying the claimants' property. Instead, the circuit found that the president's foreign policy power to espouse claims -- a Presidential power asserted and acquiesced in by Congress,

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[28](...continued)
(1937) (dicta); *Mitchell v. Harmony*, 54 U.S. (13 How.) 115 (1851) (dicta); *Porter v. United States*, 496 F.2d 583, 591, 204 Ct. Cl. 355 (1974), *cert. denied*, 420 U.S. 1004 (1975); *Seery v. United States*, 127 F. Supp. 601, 603, 130 Ct. Cl. 481 (1955); *Turney v. United States*, 115 F. Supp. 457, 464, 126 Cl. Ct. 202 (1953); *see Reid v. Covert*, 354 U.S. 1, 9 (1957) (citing *Mitchell* and *Turney* with approval). That the extraterritoriality of the property is not of paramount consideration can also be implied from this Court's decisions in *YMCA, United States v. Caltex*, 344 U.S. 149 (1952), *Juragua Iron Co. v. United States*, 212 U.S. 297 (1909), and *Ribas y Hijo v. United States*, 194 U.S. 315 (1904). In each case, the claimant's property was taken outside the United States -- and in each, the Court denied compensation on a basis other than the simple and undisputed fact that the property was located outside the United States. More recently, in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), the Court distinguished the applicability of the Fourth Amendment -- which is not available to foreign citizens on foreign soil -- with that of the more broadly phrased Fifth Amendment. *Id.* at 264-66. The Federal Circuit did not address this question although an unavoidable implication of its holding here is that the Just Compensation clause does not apply to property located abroad whether acquired by will, gift or investment.

see Dames & Moore, 453 U.S. at 688 -- satisfied the requirements of *Lucas*.

By including in the applicable common law to be examined the power to condemn or espouse, the Federal Circuit has critically undermined *Lucas*. The analysis assures there can never be a taking because in every case of property ownership there will always be the possibility of condemnation which, under the analysis below, renders the taking a "non-compensable taking."

As for the second error -- whether a right to continued possession of any interest inhered in petitioners' title to their property, the Federal Circuit did not cite to *any* decision from this Court which even remotely supports the proposition that the President has the power to appropriate a citizens property free of any obligation of compensation. Nor could it.[29]

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[29] *See Gray v. United States*, 21 Ct. Cl. 340, 392-93 (1886), holding that a claims settlement by the United States was a taking. Petitioners did not argue below, and are not asserting here, that *Gray* is binding in this case. However, *Gray* is either a correct statement of the law or it is not. If it is not a correct statement of the law, then either (a) it was incorrect when made or (b) the principles articulated in *Gray* have somehow changed. That the former is not the case is indicated by Congress' payment of claims. Indeed, the court below distinguished *Gray*, determining that Fifth Amendment jurisprudence had "evolved" over the last 100 years. It did not, however, point to any cases in which the principles enunciated in *Gray* have been abandoned or modified by this Court.

The few times the Court has had similar questions before it, it has declined to interpret the Fifth Amendment contrary to *Gray*. As noted above, in *Dames & Moore*, the Court considered whether the transfer of claims was a taking. If the court below is correct that under an evolved Fifth Amendment, claims against a foreign sovereign may be taken without just compensation, the Court could have summarily answered this question in the negative. In *United States v. Sperry Corp.*, 493 U.S. 52 (1989), the Court

(continued...)

"[N]either the President nor Congress may exercise their powers so as to contravene the protections of the Bill of Rights, even when acting in the sphere of international relations." *Main*, 651 F.2d at 813, n. 20. The President's power to espouse claims is not merely an analogue to the power of eminent domain -- it is the same power and has the same purpose:

> The right of sovereigns to dispose of the effects of individuals in order to make peace, is often a disputed point, nor can they exercise this right over the property of subjects in any manner other than as sovereigns. The property of subjects is so far under the eminent control of the State, that the State or the sovereign who represents it, can use that property, or destroy it, or alienate it, not only in the case of extreme necessity, which sometimes allow individuals the liberty of infringing upon the property of others, but on all occasions, where the public good is concerned, to which the original framers of society intended that private interests should give way. But when that is the case, it is to be observed, the State is bound to repair the losses of individuals, at the public expense, in

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[29](...continued)
considered whether the imposition of a fee on Tribunal awards was a compensable taking. The Court concluded that it was not, and specifically distinguished *Gray*, noting that the United States had not canceled altogether Sperry's claims. *Id.* at 59 n.6. In *Sperry*, the Court also explicitly noted that Sperry was not asserting the claim advanced by petitioners here -- that the government's action had led to a gross recovery less than would have otherwise been obtained. *Id.* at 59-60. Again, petitioners are not contending that the Court has adopted the rule in *Gray* -- it is clear, however, that this Court has not subscribed to an evolution of the Fifth Amendment that overrules *Gray*.

> aid of which the sufferers have contributed their due portion. 1 Nichols on Eminent Domain § 1.2[2] (quoting Grotius, *De Jure Belli et Pacis*, Lib. III, C.20, Sec. 7 (1625)).[30]

Yet the court below did not simply conclude that the President has the power to take property without compensation.[31] It found -- without citation to any authority whatsoever -- that the potential exercise of the power is an incorporeal hereditament burdening any and all property acquired through international commerce.[32] The decision of the Federal Circuit is striking in one more respect: not only did the court hold that the President has the power to appropriate

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[30] *See also Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 283 (1796) (Opinion of Cushing, J.) (reinstatement of previously canceled debts to foreign subjects could be considered proper exercise of eminent domain). The relationship between the power to espouse and the obligation to compensate was recognized in that case as well:

> [t]hat Congress had the power to sacrifice the rights and interests of private citizens to secure the safety or prosperity of the public, I have no doubt; but . . . ample compensation ought to be made to all . . . who have been injured by the treaty for the benefit of the public. This principle is recognized by the constitution . . . *Id.* at 245 (Opinion of Chase, J.).

[31] In any event, even if he possessed this power, the potential that this power might be exercised had not ripened into a property right at the time petitioners acquired their property. It was -- at very most -- a mere "unilateral claim of entitlement," *Nollan v. California Coastal Comm.*, 483 U.S. 825, 833 n.2 (1987), not an enforceable property interest.

[32] Petitioners University of Northern Colorado and Gurney, for example, acquired their rights against Iran as the result of transactions with Iran conducted in the United States. *See* App. 80a-82a (*Matter of University of Northern Colorado*); App. 49a-50a (*Matter of Gurney*).

without just compensation, it found that this proposition is such a common place that each and every petitioner can be charged with knowledge of it, without any evidentiary showing at all, despite the explicit, contrary language of the 1955 Treaty of Amity between the United States and Iran.[33] This is exactly the kind of abuse the Court sought to prevent when it explained that only rules derived from an "*objectively reasonable application*" of pre-existing law can be said to inhere in a property owner's title. *Lucas*, 505 U.S. at 1032 n.18.

The lower court's extraordinary holding has implications far beyond this case. First, there is the question of what is the proper source for determining whether, under *Lucas*, a sovereign's right to appropriate or condemn property is to be considered in the "logically antecedent" analysis under *Lucas*. Second, does the President have the power to appropriate private property without just compensation, simply because the property was acquired in international commerce.

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[33]The Treaty of Amity provided that

> Property of nationals and companies of either High Contracting Party, including interests in property, shall receive the most constant protection and security within the territories of the other High Contracting party, in no case less than that provided for by international law. Such property shall not be taken without the prompt payment of just compensation. 8 U.S.T. 899, T.I.A.S. No. 3853. art. IV(2).

Petitioners were therefore operating in a fundamentally different environment from the plaintiffs in *California Housing Securities, Inc. v. United States*, 959 F.2d 955, 959 (Fed. Cir. 1992), cited by the concurrence below. App. 15a. Those plaintiffs were involved in banking, "'one of the longest regulated and most closely supervised of public callings,'" *id.* at 958 (*quoting Fahey v. Mallonee*, 332 U.S. 245, 250 (1947), and could therefore not claim a taking when the government exercised its regulatory authority to place their savings and loan association in receivership.

Finally, is this Presidential power an incorporeal hereditament -- a present property interest -- of all property?

The Court should grant *certiorari* to resolve these questions.

CONCLUSION

For the foregoing reasons, the writ of *certiorari* should be granted.

Respectfully submitted,

STEPHEN M. TRUITT
Counsel of Record
PEPPER HAMILTON LLP
1300 Nineteenth Street, N.W.
Washington, D.C. 20036
(202) 828-1230

JOHN A. WESTBERG
LEWIS M. JOHNSON
WESTBERG & JOHNSON
1300 Nineteenth Street, N.W.
Washington, D.C. 20036
(202) 835-9810
Counsel for Petitioner

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